ETHICS ALERT

The New Limited Exception to the Professional Duty to Protect Client Confidences and Secrets

Committee on Professional Responsibility and Conduct

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It can happen to any lawyer. While counseling a client, the client tells the lawyer a disturbing fact – for example, that the client's spouse has been physically abusing their child. Immediately after this disclosure, the client tells the lawyer that no one should ever know what the client just disclosed. What should the lawyer do?

For much of California's history, the answer was to preserve the client's secret and to abide by the client's instruction.[1/] Unlike the attorney-client privilege, which is an evidentiary privilege subject to exceptions, and long after other jurisdictions had allowed lawyers to disclose client secrets under specified circumstances, California continued to treat the ethical duty of confidentiality as virtually absolute. The ethical duty traditionally has been understood to be broader than the attorney-client privilege and to preclude lawyer disclosure of client information when disclosure would be embarrassing or would likely be harmful to the client, absent client consent.[2/]

The duty of confidentiality is often misunderstood. Lawyers are criticized for withholding information that the layman believes should have been disclosed in the interests of discovering the truth or preventing the possibility of harm. Yet, the lawyer's duty of confidentiality is first and foremost a duty owed to the client, not the general public. And from this vantage point, the protection of client confidential information recognizes and serves several important values. The protection of confidentiality serves the public interest by encouraging client disclosures, which enables lawyers to better advise and assist their clients in complying with the law. *In re Jordan* (1972) 7 Cal.3d 930, 940-941 [103 Cal.Rptr. 849]. Protecting client confidential information also respects the autonomy and personal integrity of the

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[1/] California Business and Professions Code section 6068(e)(1): "It is the duty of an attorney . . . [t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

[2/] The terms "confidence" and "secrets" have developed their own usage. California State Bar Formal Opn. No. 1981-58:

> In the context of Business and Professions Code section 6068, subdivision (e), "secrets" is not limited to attorney-client communications. "This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge." Any "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client" is a secret which must be preserved. (Citations omitted.)

This Ethics Alert uses the term "client confidential information" to refer to the lawyer's professional obligations under Business and Professions Code section 6068(e) and the California Rules of Professional Conduct.

client, and recognizes that the client retains the right to make ultimate decisions regarding the outcome of the engagement. *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 403-405 [212 Cal.Rptr. 151]; Restatement (Third) of the Law Governing Lawyers (2000) § 21, cmt. e. Traditionally, the client reposed his or her trust in the lawyer, and in return the lawyer held inviolate the secrets of the client. This duty of confidentiality has its costs, however, and most other American jurisdictions have recognized exceptions to permit disclosures of client information, if only to prevent harm to another.[3/]

In 2004, California followed suit when our legislature adopted Business and Professions Code section 6068(e)(2) and our Supreme Court approved a new Rule of Professional Conduct, rule 3-100, that expressly recognize an exception to the duty of California lawyers to preserve their clients' secrets. How does rule 3-100 affect this duty?

Rule 3-100 is organized into separate statements. Rule 3-100(A) sets forth the lawyer's fundamental obligation to preserve client secrets:

> A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.

Rule 3-100(B) states the limited exception to the absolute duty:

> A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

Rule 3-100(C) describes how and when the lawyer should inform the client that client confidential information may be disclosed:

> Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:
>
> (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and
>
> (2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).

Rule 3-100(D) emphasizes that any permitted disclosure should be limited:

[3/] The American Bar Association approved such an exception in 1983. Model Rules of Professional Conduct, Rule 1.6(b)(1) (1983). Rule 1.6(b)(1) was, and remains in its current form, a rule of permissive disclosure. Many states have, however, adopted rules that require disclosure in this setting. See, John S. Dzienkowski, *Professional Responsibility Standards, Rules & Statutes* (Abr. ed. 2005-2006), pp. 107-114 (identifying twelve states requiring lawyers to disclose client's intent to engage in conduct that would likely result in death or infliction of serious bodily injury to third person).

> In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.

Finally, rule 3-100(E) states that even when all of the elements of rule 3-100(B) have been satisfied, the decision to reveal client secrets is discretionary and the lawyer has no duty under the rule to make such disclosure:

> A member who does not reveal information permitted by paragraph (B) does not violate this rule.

The fundamental point about rule 3-100(B) is that it is permissive – it creates a right to disclose, not a duty to disclose. If a lawyer finds that the elements of rule 3-100(B) have been met, the lawyer may disclose the client's secrets. However, the lawyer need not. Even if other lawyers under the facts of the particular case would disagree, the lawyer's decision not to disclose is not subject to challenge as violative of rule 3-100.

How does the lawyer conclude that disclosure is permissable? Rule 3-100(B) contains several elements, each of which must be satisfied. The lawyer must "reasonably believe" that "disclosure is necessary" to prevent a "criminal act" that the lawyer "reasonably believes" is "likely" to result in death of or substantial bodily harm to an individual. First, the lawyer must "reasonably believe." A reasonable belief is one that is well grounded in fact.

Second, the lawyer must reasonably believe disclosure is necessary to prevent a criminal act. The lawyer must have a well-founded belief that disclosure will be effective in preventing the conduct and that the conduct is criminal. Confidential client information about conduct that has occurred, or will occur before the lawyer can effectively prevent its occurrence, may not be disclosed.[4/]

Third, the lawyer must reasonably believe that the criminal conduct, if not disclosed, is likely to result in death or substantial bodily harm. Rule 3-100 does not impose an "imminency" requirement (i.e., the time between the conduct and the harm need not be short), but there must be a clear causal link between the conduct and the apprehended harm. More importantly, it is not just any harm that permits disclosure under rule 3-100(B), but grave harm – death or substantial bodily injury.

Lawyers must address the question whether the apprehended harm would satisfy the ''substantial bodily harm" requirement of rule 3-100(B) on a case-by-case basis. The use of the term "substantial bodily harm" in rule 3-100(B) parallels the use of the same term as an exception to the attorney-client privilege.[5/] The drafters of rule 3-100 did not define the term, nor is it defined in the Evidence Code. A

[4/] Cf. *McClure v. Thompson* (9th Cir. (Oregon) 2003) 323 F.3d 1233, cert. denied, *sub nom. McClure v. Belleque* (2003) 540 U.S. 1051 [124 S.Ct. 804]; New York City Bar Formal Opinion 2002-01:

> [A] lawyer may not ethically disclose client confidential information based upon her mere suspicion that a client intends to commit a future crime, ... but that she must have a reasonable basis for believing that the client intends to commit a crime before she is permitted to make disclosure (holding that disclosure of client's confidential information as to burial location was necessary because of lawyer's reasonable belief that children were still alive and could be rescued).

[5/] Evidence Code section 956.5.

California jury instruction defines the analogous term "great bodily injury" as "significant or substantial bodily injury" which is "greater than minor or moderate harm." CALCRIM 821 (Child Abuse Likely to Produce Great Bodily Harm or Death).[6/] While general, that definition provides some guidance for lawyers to consider if confronted with the issue.

Assuming the lawyer has formed a reasonable belief that a crime will be committed that is likely to result in death or substantial bodily harm, what should the lawyer do? The comments to rule 3-100 state that "disclosure is a last resort, when no other available action is reasonably likely" to prevent the apprehended harm.[7/] A lawyer's duties to the client include the duty to advise and counsel. Although this is not an option in every case, the lawyer should consider discussing the situation with the client. Did the client mean what was said? Was the client angry or concerned? Is the client fearful that the situation will be disclosed? Discussion with the client will not only give the lawyer a clearer understanding of the situation, it will provide an opportunity for the lawyer and the client to reason together to a peaceful resolution. If the information disclosed by the client in our hypothetical is true, the lawyer may be able to advise the client how to resolve the situation in a way that protects both the client and the child.

The lawyer may find that while the assertion of abuse is true, the client is fearful and will not authorize the lawyer to disclose the facts. What should the lawyer do next? Contemplating disclosure without the client's consent puts the lawyer at odds with the client's self-defined interests.[8/] Rule 3-100 states that the lawyer "shall, if reasonable under the circumstances," "inform the client . . . of the lawyer's ability or decision" to disclose. How and when a lawyer discharges that obligation is left to the lawyer. A lawyer may consider not only the possibility of harm to others but also the potential for harm to the lawyer. For example, when the client is threatening another person, the lawyer may delay informing the client of the lawyer's intent to disclose if the lawyer reasonably believes that disclosure to the client may place the physical safety of others in jeopardy.[9/]

[6/] See also Penal Code section 12022.7(f) (great bodily injury); Penal Code section 243(f)(4) (serious bodily injury); CALCRIM 925 (serious bodily injury).

[7/] Rule 3-100, comment 6.

[8/] Rule 3-100, comment 11 (when a lawyer has disclosed client confidential information as permitted by rule 3-100(B), the attorney-client relationship will usually have deteriorated such that the lawyer should withdraw from the representation).

[9/] Disclosure of the client's secret under rule 3-100(B) will not automatically make the lawyer a witness against the client because the professional duty of confidentiality is distinct from the attorney-client privilege. If the client's disclosures were not made for the purpose of a crime or fraud, they would still be protected by the attorney-client privilege. If the information qualifies as an exception to the attorney-client privilege, however, the information may be admitted. See, *People v. Dang* (2001) 93 Cal.App.4th 1293, 1298 [113 Cal.Rptr.2d 763] (holding that threats to inflict death or substantial bodily harm are not protected under the attorney-client privilege pursuant to Evid. Code § 956.5). Moreover, disclosed client confidential information may be used against the client in subsequent or pending legal proceedings. *People v. Navarro* (2006) 138 Cal.App.4th 146 [41 Cal.Rptr.3d 164] (holding that violation of lawyer's duty to protect client confidential information did not preclude law enforcement from using disclosures to obtain search warrant that led to seizure of incriminating evidence).

CONCLUSION

It is not uncommon for lawyers, especially those who practice in the criminal or family law areas, to obtain confidential information from clients about threatened conduct that could result in bodily harm or even death. The lawyer is faced with the dilemma of preserving the client's secrets or of disclosing the information to prevent harm to another. Until recently, the lawyer could not act to protect innocent victims without breaching the duty of confidentiality, but now rule 3-100 permits the lawyer to disclose such information under specified circumstances. The rule and its extensive comments provide a helpful guide to lawyers faced with this dilemma.